

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON T. GUTOWSKI,

Plaintiff,

v.

MCKESSON CORP. and ELI LILLY &  
CO.,

Defendants.

No. C 12-6056 CW

ORDER GRANTING  
MOTION TO REMAND  
AND AWARDING COSTS  
(Docket No. 17)

Plaintiff Jason Gutowski moves to remand this action to state court. Defendant Eli Lilly & Company opposes the motion. The Court takes the matter under submission on the papers and grants the motion.

BACKGROUND

This is one of more than forty cases currently pending in California state and federal courts alleging harm from the ingestion of pharmaceutical drugs containing propoxyphene. On October 23, 2012, the plaintiffs in one of those pending actions filed a petition with the California Judicial Council seeking to coordinate all current and future cases raising similar claims. See Cal. Civ. Proc. Code § 404. The petition requested the appointment of a "coordination motion judge" for the seven propoxyphene cases that had been filed in California Superior Court at that time "as well as other such cases that may be filed before this Petition is decided." Docket No. 1, Petition at 7. As of this date, the Judicial Council has yet to decide the coordination petition.

1 On November 19, 2012, roughly one month after the  
2 coordination petition was filed, Plaintiff brought this action in  
3 Marin County Superior Court. His complaint asserts that his  
4 mother suffered fatal "cardiac injuries" in 2003 after taking a  
5 propoxyphene-based drug manufactured by Defendant. Docket No. 1,  
6 Compl. at 2-3. He is the only plaintiff named in this lawsuit and  
7 has not asserted any class claims.

8 Defendant removed this action on November 29, 2012. Docket  
9 No. 1, Notice at 1-9. In its notice of removal, it asserted that,  
10 because this case is likely to be consolidated with the other  
11 California propoxyphene cases, it is removable as part of a "mass  
12 action" under the Class Action Fairness Act (CAFA), 28 U.S.C.  
13 § 1332(d)(11). Plaintiff filed a motion to remand on January 24,  
14 2013.

#### 15 LEGAL STANDARD

16 A defendant may remove a civil action filed in state court to  
17 federal district court so long as the district court could have  
18 exercised original jurisdiction over the matter. 28 U.S.C.  
19 § 1441(a). Title 28 U.S.C. § 1447(c) provides that if, at any  
20 time before judgment, it appears that the district court lacks  
21 subject matter jurisdiction over a case previously removed from  
22 state court, the case must be remanded. On a motion to remand,  
23 the scope of the removal statute must be strictly construed. Gaus  
24 v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). "The 'strong  
25 presumption' against removal jurisdiction means that the defendant  
26 always has the burden of establishing that removal is proper."  
27 Id.; see also Wash. State v. Chimei Innolux Corp., 659 F.3d 842,  
28 847 (9th Cir. 2011) ("The burden of establishing removal

jurisdiction, even in CAFA cases, lies with the defendant seeking removal.")). Courts should resolve doubts as to removability in favor of remanding the case to state court. Gaus, 980 F.2d at 566.

#### DISCUSSION

CAFA gives federal courts jurisdiction over any "mass action" in which (1) the amount in controversy exceeds five million dollars; (2) at least one plaintiff is diverse from one defendant; and (3) at least one plaintiff's claim exceeds seventy-five thousand dollars. 28 U.S.C. § 1332(d); Abrego v. Dow Chem. Co., 443 F.3d 676, 689 (9th Cir. 2006). At issue here is the scope of the term "mass action."

Under CAFA, "mass action" is defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11). Defendant contends that the present case satisfies this definition because it is likely to be coordinated with the other propoxyphene lawsuits currently pending in California state courts. Once that coordination occurs, Defendant argues, the total number of plaintiffs in all of the propoxyphene cases will exceed one hundred and thus satisfy CAFA's "mass action" definition.

Defendant's argument fails for two reasons. First, the October 2012 coordination petition does not propose a joint trial and, thus, cannot satisfy CAFA's "mass action" definition. Second, even if it did propose a joint trial, removal is still premature because the petition remains pending and Plaintiff has

1 not attempted to coordinate this case with the other propoxyphene  
2 actions.

3 I. Mass Actions Must Be "Tried Jointly" Under CAFA

4 Two courts in this district have expressly rejected  
5 Defendant's argument that the October 2012 coordination petition  
6 renders all of the pending propoxyphene cases part of a single  
7 "mass action." Posey v. McKesson Corp., 2013 WL 361168, at \*2-\*3  
8 (N.D. Cal.), appeal docketed [no case number assigned] (9th Cir.  
9 Feb. 7, 2013); Rice v. McKesson Corp., 2013 WL 97738, at \*2 (N.D.  
10 Cal.), appeal docketed No. 13-80007 (9th Cir. Jan. 28, 2013); see  
11 also L.B.F.R. v. Eli Lilly & Co., Case No. 12-10025-ODW, Docket  
12 No. 8, Remand Order, at 3 (C.D. Cal. Dec. 6, 2012) ("Despite  
13 Defendants' [sic] obtuse reasoning concerning a pending state  
14 court motion for the coordination of cases, this case does not yet  
15 involve 100 or more plaintiffs."). Both courts in this district  
16 reasoned that, because the "'petition for coordination . . . is  
17 bereft of any explicit proposal that the claims of these  
18 plaintiffs be tried jointly,'" as required by CAFA, the cases do  
19 not constitute a "mass action." Posey, 2013 WL 361168, at \*2  
20 (quoting Rice, 2013 WL 97738, at \*2) (emphasis in original).

21 Despite these rulings, Defendant contends that the  
22 coordination petition does, in fact, propose a joint trial. It  
23 relies on In re Abbott Labs., Inc., 698 F.3d 568, 571-72 (7th Cir.  
24 2012), for support. There, the Seventh Circuit reversed a  
25 district court's order remanding a case to state court because the  
26 plaintiffs had moved to consolidate their case with ten similar  
27 actions involving several hundred plaintiffs. Id. The court held  
28 that the motion to consolidate proposed a joint trial, thus making

1 it removable under CAFA. Id. The court highlighted language in  
2 the motion requesting consolidation “through trial” and “not  
3 solely for pretrial proceedings.” Id. at 571. Defendant here  
4 contends that the petition to coordinate the propoxyphene cases  
5 similarly proposes a joint trial because it seeks coordination  
6 “for all purposes.” Docket No. 1, Petition at 8.

7 Defendant’s reliance on Abbott Labs is unavailing. The  
8 decision is not binding on this Court and, even if it was, it is  
9 inapposite. As the courts in Rice and Posey each noted, the  
10 October 2012 coordination petition does not propose or even refer  
11 to a joint trial. It focuses, instead, on the potential benefits  
12 of coordination during pretrial proceedings, noting that  
13 coordination would avoid “duplicative discovery” and protect  
14 “judicial resources.” Docket No. 1, Petition at 6. Furthermore,  
15 the petition’s use of the phrase “for all purposes” appears simply  
16 to reflect the language of California’s coordination statute; it  
17 is not a proposal for joint trial. See Cal. Civ. Proc. Code  
18 § 404.1 (“Coordination of civil actions sharing a common question  
19 of fact or law is appropriate if one judge hearing all of the  
20 actions for all purposes in a selected site or sites will promote  
21 the ends of justice . . . .” (emphasis added)). Abbott Labs thus  
22 offers little guidance here.

23 In contrast, the Ninth Circuit’s decision in Tanoh v. Dow  
24 Chemical Co., 561 F.3d 945, 954 (9th Cir. 2009), does provide some  
25 direction. In Tanoh, the court considered “whether seven  
26 individual state court actions, each with fewer than one hundred  
27 plaintiffs, should be treated as one ‘mass action’ eligible for  
28 removal to federal court under the Class Action Fairness Act.”

1 Id. at 945. The court held that the seven actions were not  
2 removable under CAFA, reasoning that the statute's "mass action"  
3 provision was "fairly narrow" in scope. Id. at 953.

4 In reaching this conclusion, the Tanoh court relied on  
5 another CAFA provision, which expressly excludes from the  
6 definition of "mass action" cases that "have been consolidated or  
7 coordinated solely for pretrial proceedings." Id. at 954 (citing  
8 28 U.S.C. § 1332(d)(11)(B)(ii)(IV)). This provision, the court  
9 explained, "reinforces our conclusion that Congress intended to  
10 limit the numerosity component of mass actions quite severely by  
11 including only actions in which the trial itself would address the  
12 claims of at least one hundred plaintiffs." Id. (emphasis added).  
13 Although there was no coordination petition pending in Tanoh, the  
14 Ninth Circuit's narrow interpretation of the "mass action"  
15 provision still counsels in favor of remand here. See Rice, 2013  
16 WL 97738, at \*2 ("Construing plaintiffs' petition for coordination  
17 as the functional equivalent of an express request for a joint  
18 trial would conflict with both the guidance proved by our court of  
19 appeals in Tanoh, as well as with the general canon of strict  
20 construction of removal statutes."); Posey, 2013 WL 361168, at \*3  
21 (same) (quoting Rice, 2013 WL 97738, at \*2).

22 Defendant's final argument against remand, which was not  
23 raised in Rice or Posey, is that CAFA's legislative history  
24 reveals Congress's intent to give federal courts jurisdiction over  
25 cases like this one. For support, Defendant cites a handful of  
26 statements made during House floor debates about CAFA's general  
27 purpose. None of these statements, however, specifically  
28 addresses the scope of CAFA's "mass action" provision. The

1 legislative proceedings that do address this provision suggest, if  
2 anything, that Congress actually intended to exclude consolidated  
3 mass tort cases -- such as the present case -- from the definition  
4 of "mass action." During one Senate debate, for instance, Senator  
5 Trent Lott, a co-sponsor of the bill, responded specifically to  
6 concerns that consolidated mass tort cases might be removed as  
7 "mass actions" under CAFA. He made clear:

8       Mass torts and mass actions are not the same. The  
9       phrase "mass torts" refers to a situation in which many  
10      persons are injured by the same underlying cause, such  
11      as a single explosion, a series of events, or exposure  
12      to a particular product. In contrast, the phrase "mass  
13      action" refers to a specific type of lawsuit in which a  
14      large number of plaintiffs seek to have all their claims  
15      adjudicated in one combined trial.

16     151 Cong. Rec. S1076-01, 2005 WL 292034 (daily ed. Feb. 8, 2005).  
17     Representative Bob Goodlatte, who helped author the legislation,  
18     expanded on this distinction. In his comments on the final bill,  
19     he stated that CAFA "will have absolutely no effect" on a group of  
20     then-pending lawsuits filed in New Jersey state courts against the  
21     prescription drug manufacturer, Merck. As he explained,

22       the majority of personal injury cases brought against  
23       Merck are individual cases that would not be affected by  
24       the bill in any manner whatsoever. These include more  
25       than 400 personal injury cases that are part of a  
26       coordinated proceeding in New Jersey State court. None  
27       of these cases will be affected by the bill because they  
28       are neither class actions nor mass actions.

29     151 Cong Rec. H723-01, 2005 WL 387992 (daily ed. Feb. 17, 2005)  
30     (emphasis added); see also id. ("[N]ot a single Vioxx case has  
31     been brought against Merck in State court by more than 100  
32     plaintiffs, one of the requirements for removal to Federal Court  
33     under the class action legislation. Thus, there is no reason to  
34     believe that the mass action provision would affect any Vioxx-

1 related cases whatsoever.”). Thus, according to one of CAFA’s  
2 principal drafters, individual lawsuits do not become removable  
3 simply because they have been coordinated with other lawsuits in  
4 state court. CAFA’s legislative history, therefore, does not  
5 support Defendant’s reading of the “mass action” provision.

6 Nevertheless, while removal is premature at this stage, this  
7 action may become removable in the future if Plaintiff seeks to  
8 coordinate this case with other propoxyphene cases for trial at  
9 some later date. Tanoh, 561 F.3d at 956. Until then, however,  
10 this Court lacks subject matter jurisdiction over the case.

11 II. Plaintiff Did Not Seek Coordination

12 Even if coordinated cases constituted a “mass action” under  
13 CAFA, removal would still be premature at this stage because none  
14 of the propoxyphene cases have actually been coordinated. The  
15 coordination petition remains pending before the Judicial Council  
16 and Plaintiff has not made any independent effort to join that  
17 petition. Indeed, none of his filings in state court or in this  
18 Court indicates that he wishes to coordinate this case with any  
19 other case.

20 Nevertheless, Defendant contends that Plaintiff’s counsel  
21 “tacitly approved” of coordination here “by not objecting” to a  
22 statement made in an e-mail that Plaintiff’s counsel received the  
23 day after Plaintiff filed his complaint. Opp. 2. The e-mail was  
24 sent to Defendant’s counsel by Matthew Sill -- one of the  
25 attorneys who filed the coordination petition -- and merely  
26 confirms that his petition sought to include later-filed cases  
27 such as this one. Declaration of Rachel B. Passaretti-Wu, Ex. 1.  
28 Although Sill does not represent Plaintiff here, Defendant argues

1 that "there is a strong basis in fact to impute Mr. Sill's  
2 statements (and therefore the Coordination Petition) to  
3 Plaintiff's attorney" because Plaintiff's attorney was copied on  
4 Sill's e-mail. Opp. 2.

5 This argument is unpersuasive. Defendant has failed to  
6 identify a single affirmative step that Plaintiff has taken to  
7 coordinate this case with the other propoxyphene cases. His  
8 attorney's failure to respond to Sill's e-mail -- an e-mail from a  
9 non-party -- to Defendant's counsel cannot plausibly be read as  
10 such a step. Moreover, Plaintiff's attorney was one of five  
11 attorneys who were copied on Sill's e-mail. Passaretti-Wu Decl.,  
12 Ex. 1. All of these attorneys serve as Sill's co-counsel in  
13 another case -- a multidistrict action currently pending against  
14 Defendant in the Eastern District of Kentucky. Thus, Plaintiff's  
15 attorney was likely copied on Sill's e-mail because he is working  
16 with Sill in the multidistrict action, not because he represents  
17 Plaintiff in the present case. Under these circumstances, it  
18 would be particularly unreasonable to impute his failure to  
19 respond to the e-mail as an affirmative expression of his client's  
20 intentions in this case.

### 21 III. Attorney's Fees

22 Plaintiff seeks an order compelling Defendants to reimburse  
23 him for his attorney's fees and costs incurred in seeking to  
24 remand this case. Title 28 U.S.C. § 1447(c) allows courts to  
25 "require payment of just costs and any actual expenses, including  
26 attorney fees, incurred as a result of the removal." According to  
27 the Supreme Court, the "standard for awarding fees should turn on  
28 the reasonableness of the removal." Martin v. Franklin Capital

1 Corp., 546 U.S. 132, 141 (2005). "Absent unusual circumstances,  
2 courts may award attorney's fees . . . only where the removing  
3 party lacked an objectively reasonable basis for seeking removal."

4 Id.

5 Here, Defendant lacks an "objectively reasonable basis" for  
6 seeking removal. The Judicial Council has not yet decided whether  
7 to coordinate the seven original propoxyphene cases filed in  
8 California, let alone later-filed actions such as this one.  
9 Defendant should have recognized that this fact would preclude  
10 removal. Indeed, by the time Defendant filed its opposition here,  
11 three other district courts had already held that it was premature  
12 to remove any propoxyphene case while the coordination petition  
13 remains pending. Rice, 2013 WL 97738, at \*3; Posey, 2013 WL  
14 361168, at \*3; L.B.F.R., Case No. 12-10025-ODW, Docket No. 8, at  
15 3. Plaintiff himself has not made any effort to coordinate this  
16 case; Defendant's assertion that Plaintiff's counsel consented to  
17 coordination "by not objecting" to an e-mail addressed to a non-  
18 party is untenable for reasons outlined above. In sum, even if  
19 Defendant's interpretation of CAFA's "mass action" provision  
20 presented a close legal question, Defendant still lacked a  
21 reasonable basis for seeking to remove this case when it did.  
22 Accordingly, Plaintiff's request for fees and costs is granted.

23 In this circuit, courts calculate an award of attorneys' fees  
24 using the lodestar method, whereby the court multiplies "the  
25 number of hours the prevailing party reasonably expended on the  
26 litigation by a reasonable hourly rate." Camacho v. Bridgeport  
27 Fin., Inc., 523 F.3d 973, 978 (9th Cir. 2008). The party seeking  
28 an award of attorney's fees bears the burden of producing

1 "satisfactory evidence -- in addition to the attorney's own  
2 affidavits -- that the requested rates are in line with those  
3 prevailing in the community for similar services by lawyers of  
4 reasonably comparable skill, experience and reputation." Id. at  
5 980. In the present case, Plaintiff failed to produce any billing  
6 records, affidavits, or other documentation supporting his motion  
7 for fees and costs.

8 Thus, within seven days of this order, Plaintiff may submit a  
9 supplemental brief, not to exceed three pages, with supporting  
10 documentation to address his request for fees and costs.  
11 Defendant may oppose the request in a brief, not to exceed three  
12 pages, which shall be submitted no more than seven days after  
13 Plaintiff files his brief. Plaintiff may file a two-page reply  
14 within two days of Defendant's opposition. The matter will be  
15 decided on the papers.

16 CONCLUSION

17 For the reasons set forth above, Plaintiff's motion to remand  
18 (Docket No. 17) is GRANTED. The Clerk shall vacate all future  
19 dates and remand this case to Marin County Superior Court.

20 Plaintiff's motion for attorney's fees and costs is GRANTED.  
21 The Court will determine the amount of the award based on the  
22 parties' supplemental briefing.

23 IT IS SO ORDERED.

24  
25 Dated: February 25, 2013

26   
27 CLAUDIA WILKEN  
28 United States District Judge